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SOCIAL, HUMANITARIAN AND HUMAN RIGHTS QUESTIONS: REPORTS OF SUBSIDIARY BODIES, CONFERENCES AND RELATED QUESTIONS

Implementation of the Programme of Action for the Third Decade to Combat Racism and Racial Discrimination

293rd report of the Committee on Freedom of Association of the International Labour Office

Note by the Secretary-General

1. In its resolution 1992/12 of 20 July 1992, entitled "Allegations regarding infringements of trade union rights in South Africa", the Economic and Social Council requested the Secretary-General to invite the Government of South Africa to report on the measures it had taken to give effect to the recommendations contained in the report of the Fact-finding and Conciliation Commission on Freedom of Association concerning South Africa (see E/1992/70) and to refer the reports of the Government of South Africa on that matter to the International Labour Office, with the request that the latter transmit to the Council its advice and comments stemming from examination of those reports. The Council also invited the International Labour Office to inform the Council of actions taken in that regard.

2. The Secretary-General has the honour to transmit to the Council the 293rd report of the Committee on Freedom of Association of the International Labour Office, which met at Geneva in March 1994.

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* E/1994/100.

INTERNATIONAL LABOUR OFFICE

Governing Body

GB.259/7/15
259th Session

Geneva, March 1994

Seventh item on the agenda

293RD REPORT OF THE COMMITTEE ON FREEDOM OF ASSOCIATION

Measures taken by the Government of the Republic of South Africa to implement the recommendations of the Fact-Finding and Conciliation Commission on Freedom of Association

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A. Introduction

1. The Committee on Freedom of Association, set up by the Governing Body at its 117th Session (November 1951), met at the International Labour Office, Geneva, on 17, 18 and 25 March 1994 under the chairmanship of Mr. Jean-Jacques Oechslin, former Chairman of the Governing Body.

2. A complaint concerning alleged infringements of trade union rights against the Government of South Africa was submitted by the Congress of South Africa Trade Unions (COSATU) to the Governing Body at its 240th Session in May-June 1988. In view of the fact that the Republic of South Africa ceased to be a Member of the International Labour Organization on 11 March 1966 but remained a Member of the United Nations, the matter was referred to the Economic and Social Council of the United Nations (ECOSOC), in accordance with the procedure established between the ILO and the United Nations in regard to complaints concerning violations of trade union rights against States which are not Members of the ILO but which are Members of the United Nations.

3. Following ECOSOC's request to the Government of the Republic of South Africa to give its consent to the complaint being referred to the Fact-Finding and Conciliation Commission on Freedom of Association of the ILO (hereinafter "the Fact-Finding and Conciliation Commission") and following the Government's consent to the referral of this complaint in February 1991, the Governing Body set up a panel of the Fact-Finding and Conciliation Commission to examine this case at its 250th Session (May-June 1991). The Commission issued a very detailed report [see Prelude to change: Industrial relations reform in South Africa: Report of the Fact-Finding and Conciliation Commission

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on Freedom of Association concerning the Republic of South Africa, Official Bulletin, Special Supplement, Vol. LXXV, 1992, Series B.] containing numerous recommendations relating to freedom of association and collective bargaining, which was then submitted to the Governing Body at its 253rd Session (May 1992) for transmission to ECOSOC.

4. At its July 1992 Substantive Session, ECOSOC adopted a resolution (No. 1992/12) on "Allegations regarding infringements of trade union rights" in which it requested the Secretary-General of the United Nations: to invite the Government to report on the measures which it had taken to give effect to the Fact-Finding and Conciliation Commission's recommendations; and to refer the Government's report to the ILO with the request that the ILO in turn report its advice and comments back to ECOSOC after examining the Government's report.

5. On 8 November 1993, the Government transmitted to the Secretary-General of the United Nations a report constituting its response to the recommendations of the Fact-Finding and Conciliation Commission. On 17 November 1993, the Secretary-General of the United Nations transmitted this report to the Director-General.

6. The Committee has examined the information contained in the Government's report as well as recently enacted legislation and submits for the approval of the Governing Body the conclusions it has reached concerning the measures taken to implement the Fact-Finding and Conciliation Commission's recommendations.

B. The Government's reply on measures taken to implement the recommendations of the Fact-Finding and Conciliation Commission on Freedom of Association concerning the Republic of South Africa

7. In its communication of 8 November 1993, the Government first of all refers generally to various factors which characterize and shape the contemporary South African labour market such as the high growth rate of the economically active population; the decrease in the number of employment opportunities in the formal sector since the beginning of the recession in 1989; high levels of unemployment related to a negative economic growth rate; current political developments and the situation of unrest in the country; the low levels of education of the South African population (a 1991 census data indicates that 56.4 per cent of the population may be considered as functionally illiterate), resulting in an excess demand for certain categories of skilled workers on the one hand, and an excess supply of unskilled workers, on the other hand; the low percentage of the overall expenditure of South African companies on the training and retraining of workers; and finally, low wage increases and productivity. The Government also mentions certain steps that have been taken and describes certain structures that have been created to address the various problems affecting the labour market.

8. The Government then describes more specifically, recent developments in labour issues and legislation in South Africa. First of all, it indicates that the National Manpower Commission (NMC) which remains an advisory body on labour policy for the Minister of Manpower has been restructured on a tripartite basis and is representative of employers' and workers' organizations and independent experts as well as the State. The first meeting of the restructured NMC was held on 12 February 1993 and until August 1993

this forum held five meetings. Moreover, the restructured NMC established three working groups and seven subcommitteess (whose names are enumerated by the Government) to further investigate specific issues. The Government indicates that the NMC is considering the simplification of the Labour Relations Act (LRA) and has published for comment, draft legislation to be considered by Parliament in November 1993. The more important amendments concern the simplification and clarification of procedures relating to the settlement of disputes and the deletion of the provisions regarding the prohibition on the political affiliation by trade unions as well as the prohibition on unions to grant directly or indirectly financial assistance to political parties.

9. Regarding labour legislation for farmworkers, the Government states that the Basic Conditions of Employment Act was extended to the agricultural sector on 1 May 1993. The question of the extension of the LRA to agriculture was referred to a working group in which the South African Agricultural Union (SAAU) and COSATU were represented. On 6 August 1993 SAAU and COSATU reached agreement on the issue concerning a single Act - the Agricultural Labour Act No.147 of 1993 - to be applicable to farmworkers. As far as labour legislation for domestic workers is concerned, a bill to extend the Basic Conditions of Employment Act to domestic workers was passed by Parliament during September 1993. In so far as legislation to regulate labour relations in the public sector is concerned, the Public Service Labour Relations Act came into effect on 2 August 1993.

10. The Government points out that the Department of Manpower has embarked on an investigation into the functioning of the Industrial Court system. A committee, consisting of representatives of the major users of the Court, has also been appointed to assist the Department in addressing certain problems in the functioning of the Court and streamlining its operations. Moreover, the Department has considered the problems arising from access to premises and other organizational rights of trade unions and is of the opinion that these matters should be discussed by the interested parties themselves. There is broad consensus, however, that reasonable rights to access and other reasonable organizational rights of unions should be protected. In the interim, any party involved in a dispute on any of these matters is at liberty to bring the matter to the attention of the Industrial Court.

11. The Government concludes by stating that it is aware of the labour standards as developed by the ILO, especially Conventions Nos. 87 and 98, and due cognizance will be taken thereof in the further development of labour legislation and manpower practices. It would be premature, however, at this stage to comment on how a future government would act with regard to possible readmission to the ILO or further ratification of ILO Conventions. The South African Government would nevertheless welcome ILO technical assistance with specific reference to job creation and training on a tripartite basis inside South Africa.

C. The Committee's conclusions

12. The Committee observes in a general manner that major political changes as well as far-reaching changes to labour relations legislation have taken place in South Africa in the period following the publication of the Fact-Finding and Conciliation Commission's report. It notes that the political changes which have occurred - including the adoption of a new Constitution by Parliament (which recognizes the right to associate, organize, bargain and strike), the establishment of a Transitional Executive Council

charged with the facilitation and promotion of the transition to a democratic order in South Africa in conjunction with all legislative and executive structures at all levels of government and the possible reincorporation into the Republic of South Africa of the so-called "national states" and "self-governing" territories - have been the result of negotiations between the major political parties and movements at the Multi-Party Negotiating Forum, whereas changes to labour relations legislation have by and large resulted from negotiations between employers, trade unions and the State in the restructured National Manpower Commission (NMC). However, both these changes are relevant to the recommendations of the Fact-Finding and Conciliation Commission, a number of which have already been given effect to while several matters still require attention.

(a) Restructuring of the National Manpower Commission

13. The Fact-Finding and Conciliation Commission considered that the Government should pursue vigorously the steps that were being taken to reactivate the National Manpower Commission (NMC), with a tripartite structure that was acceptable to all the parties concerned. It also recommended that the NMC's recommendations be given prompt and favourable attention by the Government.

14. The Committee notes with interest that the NMC has been restructured as a tripartite body and consists of representatives of employers' and workers' organizations and the Department of Manpower and of independent experts. It further notes that the NMC which has been functioning on a tripartite basis since February 1993 has, through its various working groups and subcommittees, considered all new labour relations legislation elaborated since that date before it was introduced in Parliament. Moreover, under the terms of article 33 of the new Constitution, the State will in future be bound to submit any proposed legislation concerning industrial relations or employment practices to the NMC for consideration and comments before introducing it in Parliament.

(b) Agricultural workers and domestic workers

15. The Fact-Finding and Conciliation Commission recommended that priority be given to the enactment of legislation extending to agricultural and domestic workers trade union and collective bargaining rights in common with other workers in South Africa.

16. Regarding labour legislation for farmworkers, the Committee notes that the Basic Conditions of Employment Act No. 3 of 1983, which deals with minimum terms and conditions of employment was extended to farmworkers with effect from 1 May 1993. This Act also affords protection against victimization on the grounds of, inter alia, union membership although it does not regulate collective bargaining. The Committee further notes that the Agricultural Labour Act No. 147 of 1993 (ALA) came into force for farmworkers on 17 January 1994. While section 1 of the ALA extends the Labour Relations Act No. 28 of 1956 (LRA) to farmworkers, the ALA also contains a number of provisions which apply exclusively to farmworkers, including provision for the establishment of an agricultural labour court which can act as a court of first instance in unfair labour practice disputes between farmworkers and their employers (section 2(d)).

17. The Committee notes with concern, however, that the ALA, which defines farming activities as "any activity on a farm in connection with agriculture, including stockbreeding, horticulture and forestry" (section 2(a)(iii)), declares such activities to be essential services with the result that strikes and lockouts are prohibited, unless an employer and a trade union on behalf of farmworkers working for such employer agree otherwise (section 2(f)). Failing such an agreement, unresolved disputes between farmworkers and their employers are subject to compulsory arbitration as provided for in section 46(1) of the LRA. The Committee recalls, however, that essential services are those services the interruption of which would endanger the life, personal safety or health of all or part of the population and that agricultural activities do not constitute essential services in the strict sense of the term [see Digest of decisions and principles of the Freedom of Association Committee, 3rd edition, 1985, para. 402]. It therefore considers that the Government should take steps to ensure that section 2(f) of the ALA is repealed so that the prohibition on the right to strike of farmworkers is removed.

18. The Committee further notes that while section 1 of the ALA extends the LRA to farmworkers, it also provides that any amendment to the LRA after 1 September 1993 will not apply to farming activities. The Committee is led to understand from this that in practice two versions of the LRA will apply. The LRA as it reads at present will continue to apply to farmworkers, despite the fact that the Act itself is in the process of amendment and that the amended version applicable to industry ("non-farming activities") would substantially comply with the recommendations of the Fact-Finding and Conciliation Commission if it is passed. Thus, in the Committee's view, the recommendations of the Fact-Finding and Conciliation Commission on the need to amend certain provisions of the LRA remain valid for the version of the Act which applies to farmworkers. These provisions relate, in particular, to the present system for the registration of trade unions (section 4(3)), the control of the contents of their constitutions (section 4(5)(a)(ii) and (iii), section 8(4)(a)(iv), (6)(c) and (d) and (8)), to interference of public authorities in trade union affairs (section 12(1) and (3)) and collective bargaining agreements (section 48(1), section 51(12), section 51A, section 78(IC)), and to restrictions, both substantive and procedural, on strike action (section 1(1), section 27A, section 35, section 46(1), (2) and (7), section 65(1)(d) and (2)(b), section 65(IA)). In the Committee's view, the Government should take steps to ensure that these provisions of the LRA are amended with respect to farmworkers.

19. As regards labour legislation for domestic workers, the Committee observes that the Basic Conditions of Employment Act No. 3 of 1983 was also extended to domestic workers with effect from 1 January 1994. It deeply regrets to note, however, that no legislation has been tabled to date to extend the provisions of the LRA to them. The Committee has been informed that a subcommittee of the NMC is currently dealing with the matter and in particular with the question of how far the LRA should be extended to domestic workers. In this respect, the Committee firmly believes that the Government should ensure that legislation is enacted as quickly as possible granting trade union and collective bargaining rights to domestic workers in South Africa.

(c) "Self-governing" territories and "national states"

20. The Fact-Finding and Conciliation Commission recommended that the Government should address urgently the serious problems posed by the existence

of 11 different sets of labour relations legislation in the various territories into which South Africa was divided with a view to ensuring that workers and employers throughout all of these territories enjoyed the basic rights of freedom of association and collective bargaining.

21. The Committee is aware of the fact that the reincorporation into the Republic of South Africa of the so-called "national states" (Transkei, Bophuthatswana, Ciskei and Venda) and "self-governing" territories (KwaNdebele, Kwazulu, Qua Qua, Lebowa, Gazankulu and Kangwane) is currently being negotiated by the Multi Party Negotiating Forum. However, it regrets to note that the Government has not provided any information on whether any measures are currently under way which envisage either the replacement of the legislation in the individual territories by the legislation applicable in South Africa generally or the harmonization of the labour relations legislation of South Africa and the various territories, in order to address the current serious problems posed by the existence of different sets of labour relations legislation. The Committee has, however, been informed that this matter is being examined by the Government and that proposals will be submitted to the NMC. In the Committee's view, the Government should be requested to give information on whether any measures are being envisaged along the lines mentioned above and, if so, how the Government proposes to implement such measures so as to assure uniformity of labour legislation and standards throughout the Republic of South Africa, including in the various "self-governing" territories and "national states" into which South Africa is divided with a view to ensuring that workers and employers throughout all of these territories enjoy the basic rights of freedom of association and collective bargaining.

(d) The public sector

22. The Fact-Finding and Conciliation Commission recommended that every effort should be made by all the parties concerned to resolve the outstanding issues in the negotiations concerning new legislation to govern labour relations in the public sector so that this legislation could be enacted as soon as possible. The problems specifically highlighted by the Commission in respect of this sector were the following: the prohibition on the registration of mixed public and private sector unions; the absence of protection against victimization; the absence of a right to strike for public servants not rendering essential services; the absence of adequate machinery for collective bargaining and settlement of disputes in all branches of the public service; and the absence of adequate conciliation and arbitration procedures for public servants rendering essential services.

23. First of all, the Committee notes with interest that the Public Service Labour Relations Act No. 102 of 1993 (the PSLRA), came into operation on 2 August 1993 and applies to all public servants, save for persons employed in terms of the Defence Act, Correctional Services Act (Prisons), Police Act and teachers.

24. The Committee further notes that by virtue of section 4(1) of the PSLRA, all employees except for departmental heads and officers employed by the Commission for Administration whose functions are of a policy-making or managerial nature, have the right to establish and, subject only to the rules of the organizations concerned, to join an "employee organization" of their choice or to refrain from establishing or joining any organization. Section 1(xii) of the PSLRA defines an employee organization as an organization consisting wholly or partly of state employees (emphasis added). In this

respect, the Committee observes that amendments to section 2(3)(b) and (d) of the LRA which were introduced in 1991 and which provide for the registration of trade unions with a mixed public service and private sector membership, came into force on 1 September 1993, thereby removing the prohibition on the registration of mixed public and private sector unions.

25. The issue of the absence of protection against victimization is also addressed by the PSLRA which in its section 4(7) prohibits victimization on account of trade union membership or non-membership or participation in the activities of a trade union.

26. With respect to the right to strike, all employees covered by the PSLRA, save those employed in essential services, have the right to strike by virtue of section 19(1), once prescribed conciliation procedures have been exhausted. Section 20(1) defines essential services as services the interruption of which could cause serious hardship to the whole or a part of the community or could endanger the life, safety or health of the members or some of the members of the community; the Committee considers that by referring to "serious hardship to the whole or a part of the community", this definition differs from its own definition, namely services the interruption of which would endanger the life, personal safety or health of the whole or part of the population. It is therefore of the view that this provision should be amended accordingly. Furthermore, section 21 provides for a system of compulsory arbitration for unresolved disputes of interest arising in essential services and which cannot be resolved through collective bargaining. Disputes of right may be dealt with by the industrial court in terms of its unfair labour practice jurisdiction (section 22(5)).

27. As regards adequate machinery for collective bargaining, the Committee notes that the PSLRA establishes a two-tier structure for collective bargaining, at central (Commission for Administration) and departmental level. Whether a matter falls to be negotiated at the one or the other level depends on whether the Commission or a relevant departmental head is empowered to deal with the matter in question under the terms of section 5. The Committee notes with interest that bargaining is compulsory (section 4(12)) and that a right to information for the purposes of collective bargaining is also established (section 4(11)). Moreover, provision is made for access to the premises and facilities of a state department with the prior approval of the head of the department (section 4(10)). Provision is further made for the registration and recognition of trade unions by virtue of sections 11 and 17, respectively.

28. Finally, the Committee notes that while the PSLRA does not apply to teachers, this category of public servants is either already covered by recently enacted legislation or is to be included under the LRA through proposed amendments to the latter. In this connection, the Committee observes that a distinction was made between persons who teach at universities and technikons, and those who teach at a school, technical college or teachers' training college. Although the former are currently still excluded from the LRA, section 2 of the Labour Relations Amendment Bill extends the ambit of the LRA to include teachers at universities and technikons.

29. Moreover, trade union and collective bargaining rights for teachers in the second category are now provided for in the Education Labour Relations Act No. 146 of 1993 (ELRA) which came into force in October 1993. The Committee notes that section 5(1)(a) of the ELRA grants the right to employees falling within its ambit freely to establish or, subject to the rules of the organization concerned, to join a trade union consisting mainly of such employees or to refrain from doing so. Thus, it would appear that teachers from a school, technical college or teachers' training college may only join

trade unions which consist mainly of the same category of workers. However, since there does not appear to be any restriction in the ELRA on these organizations of teachers from freely joining a trade union federation (section 1(vi) defines an employee organization to include a federation of employee organizations), the Committee does not consider this provision to be incompatible with freedom of association principles. In addition, the ELRA establishes the right to bargain (section 5(1)(b)), and provision is made for centralized collective bargaining between sufficiently representative trade unions and employer organizations (section 6 and sections 8-14). Furthermore, the right to strike which was previously denied to this category of workers is now provided for by section 15 of the ELRA.

(e) Amendments to the Labour Relations Act No. 28 of 1956

30. The Fact-Finding and Conciliation Commission recommended that the process of revision and consolidation of the Labour Relations Act (LRA) should be pursued vigorously, with two major objectives: to simplify the LRA and structure it in such a way so as to make it more readily usable and understandable; and to ensure the LRA's conformity with international principles on freedom of association. In order to reach the latter objective, the Commission stressed the need to amend a number of the LRA's provisions which related in particular to: (i) the system for the registration of trade unions; (ii) control of the contents of their constitutions; (iii) interference of public authorities in trade union affairs; (iv) interference of public authorities in collective bargaining agreements; and (v) substantive and procedural restrictions on stike action.

31. The Committee notes the Government's statement that the NMC is considering the simplification of the LRA and has published for comment draft legislation to be considered by Parliament soon. The Committee has been informed since then that a bill has been presented to Parliament in December 1993. Requests have been made for comments on the bill. The bill has not yet been discussed in Parliament. The Committee considers that the Government should be requested to provide information on any progress being made in regard to the process of revision and consolidation of the LRA.

(i) The system for the registration of trade unions

32. The Committee notes that under the LRA a trade union is registered in respect of specific interests and for a specific area. It will be so registered if the Registrar is satisfied that it is "sufficiently representative" of those interests in that area. However, if an existing registered union lodges an objection and the Registrar is satisfied that that union is sufficiently representative of the interests and also in the area applied for, he may, under the so-called "knockout provision" (section 4(3)), refuse to register the applicant union. The Committee recalls the principle that a provision authorizing the refusal of an application for registration if another union, already registered, is sufficiently representative of the interests which the union seeking registration proposes to defend, means that, in certain cases, workers may be denied the right to join the organizations of their choice, contrary to the principles of freedom of association [see Digest, op. cit., para. 231]. The Committee notes that the Labour Relations Amendment Bill (hereinafter LRA bill) does not address section 4(3) of the LRA. The Government should therefore take steps to ensure that this provision is amended to take account of the principle enunciated above.

(ii) Control of the contents of trade union constitutions

33. The Committee notes that section 8(4)(a)(iv) of the LRA envisages that a trade union constitution may provide for "any other matter which in the opinion of the Registrar is suitable to be dealt with in the constitution of a trade union ....." (emphasis added). The Committee considers that this section is too widely expressed and gives the Registrar an unfettered discretion to allow or disallow a particular provision in a trade union constitution. It notes with satisfaction, however, that section 7(a) of the LRA bill deletes the phrase "in the opinion of the Registrar", thereby removing his discretion in regard to the other matters which may be dealt with in a trade union constitution.

34. In addition, section 4(5)(a)(ii) of the LRA disallows registration of a trade union whose constitution contains provisions which "are contrary to the provisions of any law or are calculated to hinder the attainment of the objects of any law or are unreasonable in relation to the members of the public" (emphasis added). The Committee considers that the generality of the section leaves open the risk of administrative interference in the content of a trade union's constitution, and therefore notes with satisfaction that section 6 of the LRA bill deletes the phrase "or are unreasonable in relation to the members of the public".

35. The Committee further notes that section 4(5)(a)(iii) of the LRA prohibits the registration of a trade union affiliated to any political party. Moreover, sections 8(6)(c) and (d) and (8) prohibit a trade union from affiliating with a political party and from providing funds or carrying on any other activities with the object of assisting a political party or any candidates for election to office in a political party or legislative body. In this respect, the Committee would emphasize that a general prohibition on trade unions from engaging in any political activities would not only be incompatible with the principles of freedom of association but also unrealistic in practice since trade union organizations may wish, for example, to express publicly their opinion regarding the government's economic and social policy [see Digest, op. cit., para. 356]. It therefore notes with satisfaction that section 6 of the LRA bill removes the prohibition on the registration of a trade union affiliated to any political party while section 7 of the LRA bill deletes section 8(6)(c) and (d) and amends section 8(8) of the LRA with the effect that trade unions will be allowed freely to affiliate with a political party, to provide funds or carry on any other activities with the object of assisting a political party or any candidates for election to office in a political party or legislative body.

(iii) Interference of public authorities in trade union affairs

36. The Committee notes that section 12(1) of the LRA empowers the Registrar to investigate a union for the benefit of its members when it has become inactive. Section 12(3) gives him wide-ranging powers to conduct an inquiry into the internal affairs of a trade union if he has reason to believe that any material irregularity has occurred in connection with an election, or that the union or any of its officers or organs has failed to observe the constitution or "has acted unlawfully or has acted in a manner which is unreasonable in relation to the members and which has caused serious dissatisfaction amongst a substantial number of members in good standing". If, following his inquiry, the Registrar is satisfied that an irregularity has occurred, he may recommend to the Minister what action he considers should be taken. The Minister may, after giving the union concerned an opportunity to

make representations, order the holding of new elections or any other action recommended by the Registrar. There is no right of appeal against the Minister's decision.

37. The Committee is of the view that sections 12(1) and 12(3) of the LRA leave a considerable degree of discretion to the Registrar to investigate the internal affairs of a union, which could result in undue interference. The Committee would recall that while the principles of freedom of association do not prevent the control of the internal acts of a trade union if those internal acts violate legal provisions or rules, it is important that this control be exercised by the judicial authorities, not only to ensure the right of defence (which normal judicial procedure alone can guarantee), but also to avoid the risk that measures taken by the administrative authorities may appear to be arbitrary [see Digest, op. cit., para 452]. The Committee notes in this respect that while the LRA bill does not circumscribe the powers of the Registrar, it creates a right of appeal to the Minister against any instruction by the Registrar in terms of section 12(1) of the LRA as well as a further right of appeal to the Supreme Court against the Minister's decision (section 10 of the LRA bill, amending section 16(1) of the LRA). A right to appeal to the Supreme Court against a decision by the Minister taken in terms of section 12(3) of the LRA is also created (section 10 of the LRA bill, amending section 16(5)(a) of the LRA). The Committee considers that the above provision for a right of appeal to the Minister of Manpower and thereafter to the Supreme Court against any instruction by the Industrial Registrar issued after an inquiry into the affairs of a trade union constitutes an adequate safeguard against possible interference by the administrative authorities in trade union affairs.

(iv) Interference of public authorities in collective agreements

38. The Committee notes that section 48(1) of the LRA gives the Minister a discretion to promulgate or not to promulgate agreements freely concluded in industrial councils. In this respect, the Committee recalls the principle that the right to bargain freely with employers with respect to conditions of work constitutes an essential element in freedom of association, and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and working conditions of those whom the trade unions represent, and the public authorities should refrain from any interference which would restrict this right or impede the lawful exercise thereof [see Digest, op. cit., para. 583]. The Committee regrets to note that the LRA bill does not propose any amendment to section 48(1) of the LRA. It considers that the Government should take steps to ensure that this provision is amended in line with the principle enunciated above.

39. Similarly, the Committee regrets to note that the LRA bill does not propose any amendment to section 51(12) of the LRA which empowers the Minister to exempt or exclude certain areas or classes of work from any industrial council agreement, or parts thereof, nor to section 51A of the LRA which allows him to promulgate proposals on employment conditions coming from the employers' side alone in areas where there is no industrial council operating. In this respect, the Committee recalls the importance of the principle of the autonomy of the parties to the collective bargaining process from which it follows that the public authorities should not, as a rule, intervene in order to modify the contents of collective agreements which have been freely concluded [see Digest, op. cit., para. 593]. Moreover, if employers can impose their choice of conditions of employment in an area where there is no industrial council operating, collective bargaining is

jeopardized. The Committee therefore believes that the Government should take steps to ensure that sections 51(12) and 51A of the LRA are amended in conformity with freedom of association principles.

40. With regard to section 78(IC) of the LRA which provides that employers may not enter into stop-order arrangements with unregistered unions without the approval of the Minister, the Committee considers the requirement of ministerial approval to constitute an unwarranted interference in collective bargaining. It notes with interest that section 28(a) of the LRA bill deletes section 78(IC) from the LRA.

(v) Restrictions on strike action

41. First of all, the Committee has been informed in this respect that the Transitional Executive Council has adopted a Bill of Rights which recognizes the right to strike. However, it would be appropriate to examine the relevant provisions of the LRA.

- Procedural restrictions

42. In the Committee's view, the complicated nature of the various pre-strike requirements set out in sections 27A, 35 and 65(2)(b) of the LRA have a negative effect on the exercise of the right to strike. However, it notes that sections 14 and 16 of the LRA bill introduce amendments to sections 27A and 35, respectively, of the LRA which will have the effect of: removing the requirements that a trade union which refers a dispute to an industrial council or conciliation board must submit certain prescribed certificates; allowing unregistered unions to refer disputes to industrial councils and also to assist any individual in doing so; and simplifying the procedural requirements which have to be met for the referral of disputes to industrial councils and conciliation boards. The Committee considers that these amendments could simplify the procedural requirements for a strike to be legal under the LRA. However, it would be appropriate to examine the effectiveness of these amendments once they are implemented.

43. The Committee observes, however, that the LRA bill does not introduce any amendments to section 65(2)(b) of the LRA, which requires an affirmative vote of all union members in an undertaking affected by proposed strike action. In this connection, the Committee recalls the principle that the requirement that an absolute majority of workers should be obtained for the calling of a strike may be difficult, especially in the case of unions which group together a larger number of members. A provision requiring an absolute majority may, therefore, involve the risk of seriously limiting the right to strike [see Digest, op. cit., para. 380]. It considers that steps should be taken by the Government to ensure that section 65(2)(b) of the LRA relating to the question of strike ballots is amended so as to bring procedural requirements to render a strike lawful under the LRA into conformity with freedom of association principles.

- Substantive restrictions

44. Furthermore, the LRA bill does not introduce any amendments to sections 1(1) and 65(1A) of the LRA which limit the right to strike to shop-floor issues. The Committee recalls that the right to strike should not be limited solely to industrial disputes that are likely to be solved by the signing of a collective agreement; workers and their organizations should be able to express in a broader context, if necessary, their dissatisfaction as

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regards economic and social matters affecting their interests [see Digest, op. cit., para. 388]. The Committee accordingly considers that steps should be taken by the Government to ensure that sections 1(1) and 65(1A) of the LRA are amended so as to safeguard the legality of strikes over social and economic issues affecting workers' and trade union rights.

45. The Committee further notes that certain services contained in section 46 of the LRA where compulsory arbitration is substituted for strike action are not essential in the strict sense of the term. In particular, this is the case for the following: local authorities except when they provide essential services in the strict sense of the term, passenger transportation, the handling of perishable foodstuffs and petrol or other fuels for use by public utilities [see Digest, op. cit., para. 402]. Moreover, the Committee regrets to note that section 19(c) of the LRA bill extends the category of essential service workers to include persons working for an employer providing air traffic and navigation services. Therefore, the Government should take steps to ensure that: section 46 of the LRA is amended so that the prohibition of the right to strike is limited to those services which are essential in the strict sense of the term; and section 19(c) of the LRA bill which extends the category of essential service workers to include persons working for an employer providing air traffic and navigation services is deleted.

46. Finally, the Committee notes that those workers engaged in a lawful strike under the LRA receive immunity against criminal prosecution and civil claims but may nevertheless be dismissed. The Committee observes that the LRA bill does not introduce any amendment in this regard, but is of the view that the unfair labour practice provisions of the LRA should be amended so as to provide appropriate protection against dismissal of strikers engaged in a legal strike and of strikers where the strike, although technically illegal, was in all other respects legitimately called for the promotion and defence of workers' economic and social interests. In this connection, the Committee would emphasize that the use of extremely serious measures, such as dismissal of workers for having participated in a strike and refusal to re-employ them, implies a serious risk of abuse and constitutes a violation of freedom of association [see Digest, op. cit., para. 444].

47. In addition, the Committee notes that criminal sanctions for participation in illegal strikes remain in force. Under section 82(1)(d) of the LRA, such action in breach of the LRA is punishable by a fine of up to Rand 1,000 or one year's imprisonment or both. The Committee shares the view of the Committee of Experts that such sanctions should be imposed only where there have been violations of strike prohibitions which are themselves in conformity with the principles of freedom of association [see General Survey on Freedom of Association and Collective Bargaining, 1983, para. 223]. Since it is clear from the Committee's preceding conclusions that several of the strike prohibitions contained in the LRA are not in conformity with freedom of association principles, the provisions of the LRA imposing criminal sanctions for violations of strike prohibitions which are not in conformity with the principles of freedom of association should be repealed.

(f) Racial restrictions on trade union membership

48. The Fact-Finding and Conciliation Commission recommended that a situation should be achieved as rapidly as possible where no trade union or employers' organization limits its membership by reference to race. It recommended that a special officer should be appointed to facilitate, within a

given time, the removal of all provisions whereby membership of such organizations, or the holding of office in them, is confined to persons of a particular race.

49. In the absence of any information from the Government in respect of the above recommendation, the Committee is unable to comment on the position at present. The Government should be invited to indicate: (i) whether any applications for the registration of trade unions which limit their membership on the basis of race have been received since the report of the Fact-Finding and Conciliation Commission and what the results of such applications, if any, have been; and (ii) whether interim measures such as those recommended by the Commission regarding the removal from the constitutions of trade unions of provisions which limit their membership on the basis of race have been implemented.

(g) The right of trade unions to function freely

50. The Fact-Finding and Conciliation Commission recommended that security or other legislation which had been used in the past to restrict the right of trade unions to carry on their activities in full freedom should be reformed. More specifically, the Commission recommended that the Fund Raising Act, the Affected Organizations Act and the Disclosure of Foreign Funding Act should be repealed or amended in such a way that they cannot be used so as to interfere with the right of trade unions to administer their financial affairs without undue interference from the public authorities. It also concluded that the Internal Security Act, Publications Act and Public Safety Act have in the past been used and could still be used to: prevent trade unions from holding public meetings for trade union purposes; restrict the publication and distribution of news and information of general or special interest to trade unions and their members; and to restrict the legitimate activities of trade unions during a state of emergency. It recommended that these Acts should be reformed.

51. The Committee notes that the following bills have introduced a number of amendments to the above-mentioned Acts:

- the Abolition of Restrictions on Free Political Activity bill, which (i) amends the Publications Act by deleting the provisions referred to in paragraph 288 of the report of the Commission (namely, section 47(2)(c), (d) and (e) of the Publications Act); and (ii) amends the Internal Security Act by restricting the powers of the relevant Minister to declare organizations unlawful. Section 4(1) of the Internal Security Act currently allows the Minister to prohibit organizations which promote violence, rioting, disturbance or disorder and authorizes the detention without trial of persons engaged in such acts. Section 2 of the bill deletes the reference to "disturbance or disorder" with the result that the Minister will only be able to act against organizations or individuals who promote violence or rioting. Section 2 of the bill in any event determines that the Minister may only act on the advice of the Transitional Executive Council. (iii) Section 7 of the bill also proposes the repeal of the Affected Organizations Act and Disclosure of Foreign Funding Act;

- the Regulation of Gatherings bill (section 14(2)) proposes the repeal of sections 46(1) and (2) of the Internal Security Act which impose restrictions on freeom of assembly. The bill acknowledges the right of peaceful assembly and lays down guidelines in that regard;

- both the new Constitution and the Transitional Executive Council Act deal with the declaration of states of emergency. The former lays down the conditions under which a state of emergency may be declared and contains a number of safeguards (article 34). The Transitional Executive Council Act stipulates that the State President may use his powers to declare a state of emergency only after consultation with the TEC, who may also review a declaration and direct the State President to withdraw it (section 2(b)).

52. Thus, the Committee notes with satisfaction that substantial progress has been made in the reform of security and related legislation so as to allow trade unions to administer their financial affairs and to carry out legitimate trade union activities without undue interference from the public authorities.

(h) Attacks on trade unionists and trade union property

53. The Fact-Finding and Conciliation Commission recommended that a suitable means should be found under South African law so that outstanding cases of unresolved violence against trade unions and their members may be reopened. It also considered that it was essential that every effort should be made to bring to justice those responsible for acts of violence against trade unionists or trade union property.

54. The Committee regrets to note that the Government has provided no information on the measures taken in respect of the above recommendation, especially in the light of the fact that the Government itself had acknowledged to the Fact-Finding and Conciliation Commission that the violence required attention. The Committee is of the same view given that evidence before the Commission indicated that more than 70 attacks on trade unionists and trade union premises occurred between 1986 and 1992. In this regard, the Government should be asked to indicate whether any further attacks have been reported since the publication of the Commission's report and whether any persons have been brought to justice for violence against trade unionists or trade union property.

(i) Government interference in trade union activities

55. The Fact-Finding and Conciliation Commission recommended that every possible step should be taken to prevent the recurrence of spying and other covert activities against trade unionists on the part of any agency of the Government. It further recommended that practical measures to this end, such as the establishment of trade union-police liaison committees and police education on trade union functions and rights should be instituted without delay.

56. The Committee again notes the absence of information from the Government regarding the action taken in respect of the above recommendation. The Government should be requested to provide detailed information on the practical measures that have been taken to ensure that the Government's commitment to refrain from interference in the activities of trade unions and their members is respected by all public agencies.

(j) Employer restrictions on access to premises

57. The Fact-Finding and Conciliation Commission concluded that employer restrictions on access to prmises related specifically to the situation as it affected farmworkers, domestic workers and the mining industry, i.e. industries where workers both lived and worked on their employers' premises. The Commission recommended that the protection provided under the LRA - under the unfair labour practice jurisdiction - should be extended to farmworkers and domestic workers. In relation to the situation in the mining industry, the Commission recommended that remedies should be found which take into account the special difficulties which had arisen historically over access to mine workers by reason of the mine compound system.

58. The Committee notes the Government's statement that the Department of Manpower is of the opinion that the problems arising from access to premises should be discussed by the interested parties themselves. The Committee observes, however, that while the Agricultural Labour Act (ALA) extends the provisions of the LRA - including the industrial court's unfair labour practice jurisdiction - to farmworkers, no provision has been made in the ALA itself for rights of access. Furthermore, under the terms of the Trespass Act No. 6 of 1959 which still remains applicable, any person entering land without the permission of the owner or lawful occupier, unless it is for a lawful reason, commits a criminal offence. As noted earlier on in the Committee's conclusions, domestic workers are still excluded from the LRA. As regards the mining industry, the Committee notes that workers in this industry are covered by the LRA. It nevertheless notes that evidence presented before the Fact-Finding and Conciliation Commission indicated that the restrictions on access to premises arose pursuant to agreements entered into by the trade union representing mine workers with mine employers (emphasis added). The restrictions appeared in practice to have been imposed by individual mine managements and had affected a large number of matters relating, among other things, to the recruitment of members, the holding of meetings and the use of mine premises for union business.

59. Thus, in view of the absence of statutory rights of access under the LRA, the provisions of the Trespass Act and the difficulties which have arisen over access to mine workers by reason of the mine compound system, the Committee is of the opinion that access by trade unions to workers who are both employed and housed on their employers' premises remains problematic and is an issue which is not likely to be resolved by the interested parties themselves. In this connection, the Committee recalls the principle that workers' representatives should enjoy such facilities as may be necessary for the proper exercise of their functions, including the right of access to workplaces [see Digest, op. cit., para. 143]. In view of the fact that farmworkers, domestic workers and workers in the mining industry are both employed and housed on their employers' premises and given the absence of statutory rights of access under the LRA, the Committee considers that the Government should take the necessary measures to ensure that access is granted freely to workers in these sectors by trade unions and their officials for the purpose of carrying out normal union activities although on the premises of employers, in conformity with freedom of association principles.

The Committee's recommendations

60. In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:

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(a) The Committee notes with interest that the Government has taken measures to give effect to a number of the recommendations of the Fact-Finding and Conciliation Commission on the following points:

(i) the National Manpower Commission (NMC) has been restructured as a tripartite body and has been functioning as such since February 1993. Moreover, the State will in future be bound to submit any proposed legislation concerning industrial relations or employment practices to the NMC for consideration and comment before introducing it in Parliament;

(ii) the Basic Conditions of Employment Act No. 3 of 1983 has been extended to farmworkers and domestic workers;

(iii) the Public Service Labour Relations Act No. 102 of 1993 (PSLRA) - which applies to all public servnats except for persons employed in terms of the Defence Act, Correctional Services Act (Prisons), Police Act and teachers - addresses the problems identified by the Fact-Finding and Conciliation Commission in respect of this sector in that it regulates the right to strike, extends protection against anti-union discrimination, and introduces a system for the negotiation and determination of terms and conditions of employment of employees in the various branches of the public service;

(iv) the Labour Relations Amendment bill extends the ambit of the Labour Relations Act to include teachers at universities and technikons, while the Education Labour Relations Act No. 146 of 1993 now grants trade union and collective bargaining rights to teachers who teach at a school, technical college or teachers' training college;

(v) as regards the provisions of the Labour Relations Act (LRA) on the control of the contents of trade union constitutions, sections 7(a) and 6 of the LRA bill amend sections 8(4)(a)(iv) and 4(5)(a)(ii), respectively, of the LRA, thereby removing the risk of administrative interference in the content of a trade union's constitution; section 6 of the LRA bill amends section 4(5)(a)(iii) of the LRA to remove the prohibition on the registration of a trade union affiliated to any political party; and section 7 of the LRA bill deletes section 8(6)(c) and (d) and amends section 8(8) of the LRA with the effect that trade unions will be allowed freely to affiliate with a political party, to provide funds or carry on any other activities with the object of assisting a political party or any candidates for election to office in a political party or legislative body;

(vi) as regards the interference of public authorities in trade union affairs, the provision contained in the LRA bill for a right of appeal to the Minister of Manpower and thereafter to the Supreme Court against any instruction by the Industrial Registrar issued after an inquiry into the affairs of a trade union constitutes an adequate safeguard against possible interference by the administrative authorities in trade union affairs;

(vii) the LRA bill deletes section 78(IC) of the LRA, which requires ministerial approval in order for employers to enter into stop-order arrangements with unregistered unions;

(viii) substantial progress has been made in the reform of security and related legislation so as to allow trade unions to administer their financial affairs and to carry out legitimnate trade union activities without undue interference from the public authorities;

(ix) a Bill of Rights recognizing the right to strike has been adopted by the Transitional Executive Council.

(b) However, effect has not been given to a number of the recommendations of the Fact-Finding and Conciliation Commission in the following areas:

(i) the Government should take steps to ensure that section 2(f) of the Agricultural Labour Act No. 147 of 1993 is repealed so that the prohibition on the right to strike of farmworkers is removed. Noting that any amendment to the Labour Relations Act No. 28 of 1956 after 1 September 1993 will not apply to farming activities, the Committee is of the view that the recommendations of the Fact-Finding and Conciliation Commission on the need to amend certain provisions of the Labour Relations Act remain valid for the version of the Act which applies to farmworkers. The provisions in question, which are enumerated in paragraph 18 of the Committee's conclusions, should therefore be amended;

(ii) legislation should be enacted as quickly as possible to grant trade union and collective bargaining rights to domestic workers in South Africa;

(iii) section 4(3) of the LRA which entitles the Registrar to refuse to register trade unions which cannot satisfy him that they are "sufficiently representative" should be amended to take account of the principle according to which a provision authorizing the refusal of an application for registration if another union, already registered, is sufficiently representative of the interests which the union seeking registration proposes to defend, means that, in certain cases, workers may be denied the right to join the organizations of their choice, contrary to the principles of freedom of association;

(iv) as regards interference of public authorities in collective agreements, the Government should take steps to ensure that sections 48(1), 51(12) and 51A of the LRA are amended, in line with freedom of association principles;

(v) the Government should take steps to ensure that section 65(2)(b) of the LRA is amended in order to conform to the principle that the requirement that an absolute majority of workers should be obtained for the calling of a strike may be difficult, especially in the case of unions which group together a larger number of members, and that a provision requiring an absolute majority may therefore involve the risk of seriously limiting the right to strike;

(vi) as regards substantive restrictions on strike action, the Government should take steps to ensure that: (1) sections 1(1) and 65(1A) of the LRA are amended so as to safeguard the legality of strikes over social and economic issues affecting workers' and trade union rights; (2) section 20(1) of the PSLRA is amended to bring it into conformity with the notion of essential services in the strict sense of the term as defined by the Committee; (3) section 46 of the LRA is amended so that the prohibition of the right to strike is limited to those services which are essential in the strict sense of the

term; (4) section 19(c) of the LRA bill which extends the category of essential service workers to include persons working for an employer providing air traffic and navigation services is deleted; (5) the unfair labour practice provisions of the LRA are amended to provide appropriate protection against dismissal of strikers engaged in a legal strike and of strikers where the strike, although technically illegal, was in all other respects legitimately called for the promotion and defence of workers' economic and social interests; and (6) the provisions of the LRA imposing criminal sanctions for violations of strike prohibitions which are not in conformity with freedom of association principles are repealed;

(vii) the Government should take the necessary measures to ensure that access is granted freely to farmworkers, domestic workers and workers in the mining industry by trade unions and their officials for the purpose of carrying out normal union activities although on the premises of employers.

(c) The Committee considers that the Government should, moreover, provide information on the following points:

(i) the Government should provide information on whether any measures concerning the replacement or the harmonization of the legislation in the various "self-governing" territories and "national states" are being envisaged and, if so, how the Government proposes to implement them so as to assure uniformity of labour legislation and standards in the various territories into which South Africa is currently divided;

(ii) the Government should provide information on any progress being made in regard to the process of revision and consolidation of the Labour Relations Act (LRA);

(iii) the Government should indicate: (i) whether any applications for the registration of trade unions which limit their membership on the basis of race have been received since the report of the Fact-Finding and Conciliation Commission and what the results of such applications, if any, have been; and (ii) whether interim measures such as those recommended by the Commission regarding the removal from the constitutions of trade unions of provisions which limit their membership on the basis of race have been implemented;

(iv) the Government should indicate whether any further attacks on trade unionists and trade union premises have been reported since the publication of the report of the Fact-Finding and Conciliation Commission, and whether any persons have been brought to justice for violence against trade unionists or trade union property;

(v) the Government should provide detailed information on the practical measures that have been taken - such as the establishment of trade union-police liaison committees and police education on trade union functions and rights - to ensure that the Government's commitment to refrain from interference in the activities of trade unions and their members is respected by all public agencies.

(d) The Committee notes that while measures have been taken to give effect to a number of the Fact-Finding and Conciliation Commission's recommendations, a number of them have not as yet been implemented. It therefore recommends that the Government of South Africa be invited, through the Economic and Social Council as appropriate, to continue

submitting reports on the measures taken to give effect to the Commission's recommendations, that ECOSOC transmit such reports to the Director-General of the ILO and that he provide any advice and comments which ECOSOC might wish to have on them.

Geneva, 25 March 1994.

Jean-Jacques Oechslin,
Chairman.

POINT FOR DECISION:

Paragraph 60.